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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. [redacted] 217

PEPPERIDGE FARM, INCORPORATED,
Petitioner,

v.

THE HONORABLE
FREDERICK VAN PELT BRYAN,
DISTRICT JUDGE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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June 4, 1965

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THE HONORABLE FREDERICK VAN PELT BRYAN,
DISTRICT JUDGE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on March 8, 1965.

Citation to Opinions Below

The district court's memorandum opinion filed November 25, 1964 denying petitioner's motion to transfer pursuant to 28 U. S. C. § 1404(a) is unreported and is printed in Appendix A of this petition. The district court's memorandum opinion filed January 4, 1965 granting petitioner's motion for reargument, adhering to his original decision and denying petitioner's motion for certification to the Court of Appeals pursuant to 28 U. S. C. § 1292(b) is unreported and is

printed in Appendix B of this petition. The Court of Appeals denied petitioner's application for a writ of mandamus or other appropriate writ without opinion.

Jurisdiction

The order of the Court of Appeals was entered on March 8, 1965. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

Questions Presented

1. When a plaintiff has chosen to bring an action in a district conceded to have no connection with the subject matter of the action, with either of the parties or with any of the prospective witnesses, is the plaintiff's choice of forum entitled to such respect as to compel the defendant in a motion under 28 U. S. C. § 1404(a) to demonstrate that the balance of convenience is "heavily weighted" in favor of the district to which transfer is sought?

2. When a plaintiff has chosen to bring an action in a district having no connection with the action, may the defendant's motion to transfer the venue pursuant to 28 U. S. C. § 1404(a) to a district having substantial contacts with the action be denied on the ground that the action has some connection, not with the district in which the action was brought, but with *other districts* in the same general area of the country?

3. In order to obtain a transfer pursuant to 28 U. S. C. § 1404(a), must a defendant demonstrate that there is *no* connection between the action and the district in which the action was brought and that the focus of the action is centered *exclusively* in the district to which the transfer is sought?

4. Should a defendant's motion pursuant to 28 U. S. C. § 1404(a) to transfer an action from a district which has no connection with the action to the district in which the plaintiff admittedly resided at the commencement of the action be denied in part on the basis of the plaintiff's disputed claim that—some three months after the action was brought and one month after the motion to transfer was made, and during a delay which plaintiff himself requested—he has taken up residence in a district adjacent to the district in which the action was brought?

Statute Involved

The statutory provision involved is 28 U. S. C. § 1404(a):

> "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

Statement

The action below arises out of a controversy between petitioner, a nationally known manufacturer of bakery products, and its former distributor for southeastern Florida.

Petitioner makes a wide variety of fresh and frozen bread, rolls, stuffing, cookies and other bakery products which it markets under the "Pepperidge Farm" trade name through a variety of distribution systems in many sections of the United States, as well as in various foreign countries. Petitioner's executive offices are in Norwalk, Connecticut, and it operates bakeries in that city, in Downingtown, Pennyslvania and in Downers

Grove, Illinois. In areas not served by these three bakeries—including, as to most products, the southeastern area of Florida—"Pepperidge Farm" products are made by other manufacturers under petitioner's supervision.

For approximately 12 years prior to November 1963, Arthur Nash, the plaintiff below, acted as an independent wholesale distributor of "Pepperidge Farm" bread and rolls in an area of southeastern Florida extending from Vero Beach on the north to Key West on the south. This entire territory lies within the Southern District of Florida. Plaintiff purchased these products, most of which were produced in a Miami bakery under petitioner's supervision, and resold them to some 12 independent subdistributors who in turn resold and made actual delivery to retail grocery stores throughout southeastern Florida.

On November 22, 1963, following a lengthy dispute regarding the extent of plaintiff's responsibilities as a wholesale distributor, petitioner ceased to do further business with him and thereafter employed other methods of distribution.

Upon the termination of his distributorship, plaintiff refused to pay for the merchandise which he had purchased from petitioner during the preceding weeks, and thus continues to owe petitioner $34,903.63.

On December 2, 1963, ten days after the termination of his distributorship, plaintiff commenced an action against petitioner in the United States District Court for the Southern District of New York, claiming damages totalling $1,200,000 with respect to his business distributing "Pepperidge Farm" bakery products in

southeastern Florida. The essence of the claims asserted in the complaint (A1-A9)* is that:

> (a) Petitioner required the plaintiff, his subdistributors and the chain and independent retail stores in the southeastern Florida area to maintain prescribed resale prices at each level of distribution and at retail, that it enforced such policies by sending its representatives on inspections to plaintiff's place of business in Miami and to the retail stores throughout southeastern Florida served by plaintiff's subdistributors and that such practices constituted violations of the antitrust laws for which plaintiff is entitled to recover;
>
> (b) It unlawfully compelled plaintiff and the southeastern Florida subdistributors to handle no bakery products other than those purchased from petitioner and that this course of conduct "caused a substantial lessening of competition in the sale of Bakery Products on the East Coast of the State of Florida from Key West to Vero Beach";
>
> (c) Petitioner unlawfully terminated plaintiff's "franchise" when he refused to abide by these alleged requirements; and
>
> (d) Petitioner's action in terminating plaintiff's "franchise" constituted a breach of an alleged oral franchise agreement.

In its answers (A10-A17) petitioner denied all of these allegations and interposed a counterclaim for $34,903.63, the value of the merchandise which plaintiff had purchased and for which he had refused to pay. Plaintiff has served no reply to petitioner's counterclaims.

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* This and similar references are to the appendix to the Petition for a Writ of Mandamus or other Appropriate Writ, filed in the Court of Appeals.

Petitioner's Motion To Transfer the Case to the Southern District of Florida

On February 3, 1964, on the same day it served its answer, petitioner moved under 28 U. S. C. § 1404(a) to transfer the venue of the action from the Southern District of New York to the Southern District of Florida, on the grounds, *inter alia*, that all of Nash's claims had arisen in southern Florida, that most of the important witnesses (including all of the subdistributors and retail store operators which petitioner is alleged to have coerced into participating in unlawful trade practices) were to be found in southern Florida and that plaintiff himself lived in Miami. The motion papers show that most of petitioner's dealings with plaintiff were through its Miami office. The Southern District of New York, by contrast, was and is a complete stranger to all aspects of the controversy.

Petitioner's motion was originally returnable February 18, 1964, but plaintiff's attorneys asked and were granted a series of adjournments of the hearing on the ground that his principal attorney had trial commitments in other cases which made it impossible for him to prepare answering papers or to argue the motion. Because of these adjournments obtained by plaintiff's attorneys, plaintiff did not serve any answering papers until September 18, 1964 and the motion was not heard until September 30, 1964, nearly eight months after the motion had been made.

In his answering papers plaintiff did not deny that the entire controversy arose in, and related to southeastern Florida. He asserted, however, that the anti-

trust violations alleged in the complaint were the end result of "decisions and directions" emanating from petitioner's executive offices in Norwalk, Connecticut, and that some of his dealings with petitioner were through its offices in Downingtown, Pennsylvania and Norwalk. Plaintiff further claimed that in March 1964, a month after the motion to transfer had been made and during the period in which his attorneys were procuring adjournments of the motion, he had changed his residence from Miami, Florida to Queens, New York. He made no assertion, however, that this change of residence had been contemplated at the time the action was commenced on December 2, 1963, or even at the time, two months later, at which petitioner made its motion to transfer. He claimed to have had a job at the World's Fair, although that job had been terminated and he was apparently unemployed at the time the motion was heard. He did not deny the facts, shown in affidavits submitted by petitioner, that plaintiff owned a house in Miami in which he had lived for many years, that he had not offered it for sale or rent, or that he continued to maintain an active checking account in a Miami bank. Plaintiff made no attempt to show any material connection between the action and the Southern District of New York, in which it had been commenced, but he relied entirely on generalized connections which he claimed existed with other districts in the northeastern part of the United States.

The Decision of the District Court

Respondent's opinion denying petitioner's motion was filed November 25, 1964. A copy of that opinion

is annexed hereto as Appendix A. The decision rested on two points only:

First, Respondent deemed the issues raised by the pleadings to have *some* relationship to the northeastern part of the country, and he treated as immaterial the fact that there was no specific connection with the Southern District of New York:

> "The issues raised by the pleadings relate, among other things, to the nature of defendant's allegedly wrongful price fixing and other policies, and the manner in which such policies were enforced as against plaintiff. In the light of such issues it cannot be said that the focus of the action has no connection with the general area in the vicinity of this district where defendant has his principal offices, or is centered exclusively in Southern Florida."

Thus respondent did not oppose petitioner's position that the contacts of the action were predominantly with southeastern Florida, but, instead of weighing the relative convenience of the two districts, he ruled that transfer should not be granted when the action had some colorable relationship with the part of the country —even if not with the particular district—in which the action had been brought.

Second, although the fortuitous timing of plaintiff's asserted change of residence, his retention of his Miami house and bank account, and his temporary employment at the World's Fair suggested that plaintiff had not abandoned his Florida residence but was merely maneuvering to prevent having the trial of the action held in the district in which the alleged cause of action

arose, respondent declined to disbelieve the assertion in plaintiff's affidavit that he intended to remain in New York State and to make his living there:

> "While plaintiff was a resident of Florida when the action was commenced, and, indeed, when this motion was made, the facts as they now appear indicate that he has taken up permanent residence here [i.e., in the Eastern District of New York]."

Respondent thus concluded that, under "all the circumstances," the balance of convenience was not so heavily weighted in favor of the Southern District of Florida "as to overcome plaintiff's choice of forum."

Petitioner made a timely motion for reargument or, alternatively, for certification so as to permit an interlocutory appeal to this Court pursuant to 28 U. S. C. § 1292(b). (A54) On January 4, 1965 respondent filed a memorandum, a copy of which is annexed hereto as Appendix B, granting the motion for reargument, adhering to his original decision and denying petitioner's application for certification.

The Court of Appeals Denies Mandamus

On February 19, 1965 petitioner made an application to the Court of Appeals for a writ of mandamus or other appropriate writ directing respondent to transfer the action to the Southern District of Florida. This application was denied without opinion on March 8, 1965.

Reasons for Granting the Writ

In permitting plaintiff to maintain his action in a district entirely unrelated to any aspect of the action

or to either of the parties, in condoning plaintiff's flagrant and undeniable forum shopping and in imposing on petitioner the burden of disproving any connection between the action and the area of the country in which it had been brought, respondent has failed to apply acceptable standards for the administration of transfer motions under 28 U. S. C. § 1404(a). The criteria applied below—which are all too typical of the *ad hoc* approach generally employed by the district courts in such cases—are detrimental to the proper allocation of judicial business among the federal district courts and effectively nullify the purposes underlying the enactment of this statute.

(a)

When the district in which suit has been brought is a complete stranger to the action, transfer to a convenient forum should be granted.

Capriciously, plaintiff has elected to commence this action in a district which is utterly foreign to any aspect of this action. The pleadings and affidavits submitted below affirmatively show that the Southern District of New York has no connection whatever with the subject matter of this action, with any of the prospective witnesses or with either of the parties. In fact, petitioner does not even maintain an office in that district, and venue is supportable under 15 U. S. C. § 15 only because petitioner sells in that district through an independent distributor. Nevertheless, respondent looked beyond the boundaries of the Southern District of New York and considered factors pertaining to other districts in the same region of the country: Respondent noted that petitioner had its

principal offices "in the general area in the vicinity of this district" (i.e., in Connecticut) and that plaintiff claimed to have become a resident of the Eastern District of New York subsequent to the commencement of the action and subsequent to the making of the motion to transfer. On this basis, respondent, concluded that transfer was not required even though the Southern District of Florida, the district to which transfer was sought to be made, was the district in which the action had arisen, in which all of the plaintiff's business had been conducted, in which numerous important witnesses could be found and in which plaintiff himself resided at least until after his choice of an inappropriate forum had been challenged. Thus respondent failed to weigh the relative convenience of one district with another, but purported only to weigh one region of the country with another—an issue to which neither the proofs nor the argument were directed.

The certain consequence of this approach to the problem of transfer under Section 1404(a) is to give to a calculating plaintiff a free choice among many districts having no link to the particular case, provided only that the selected district is in the vicinity of a district having some colorable contact with the action. Particularly in antitrust cases, which notably invite broad-brushed claims by plaintiffs seeking treble damages, shrewd framing of pleadings and affidavits can readily create some seemingly plausible "connection" with at least the vicinity of the selected forum so as to forestall a meaningful examination of the real issues in the case and obfuscate the lack of connections between

the plaintiff's claim and the district in which he has chosen to bring the action. To avert a wholly arbitrary selection of forum, the courts must insist that there be some actual connection with the district in which the action was brought, and not just with another district in the same general area of the country. To do otherwise, we submit, is to invite forum shopping and to permit easy evasion of Section 1404(a) by adept draftsmanship.

(b)

Plaintiff's arbitrary choice of an irrelevant forum is entitled to no consideration by the Court.

Disregarding the plainly inappropriate choice of the Southern District of New York as the forum for trial of this action, respondent gave decisive weight to the "plaintiff's choice of forum" and thereby placed on petitioner the burden of demonstrating not only that a clear balance of convenience favored the Southern District of Florida, but that the action was centered exclusively in the latter district. While a plaintiff's selection of a forum may be entitled to consideration when it bears some rational nexus with the action, where, as here, the plaintiff has selected a wholly arbitrary forum, his selection should be disregarded and the relative convenience of the transferee district considered without any arbitrary bias in the plaintiff's favor.

(c)

The district court erroneously conditioned a transfer on defendant's demonstration that the action is connected with the transferee district exclusively.

Respondent's opinion denying the motion to transfer makes it clear that the motion was denied, not be-

cause the Southern District of New York was a more convenient forum for trying the action, but because petitioner had failed to show that "the focus of the action has *no connection* with the general area in the vicinity of this district where defendant has its principal offices, or is *centered exclusively* in Southern Florida." (Emphasis added.)

Such a criterion is inimical to the purposes underlying Section 1404(a). If transfer must be denied whenever the plaintiff can show some plausible connection with a district in the vicinity of the district in which the action is brought—or even, as here, with "the general area in the vicinity" of that district—and if the superior convenience of the transferee district is to be ignored unless the action is focused in that district exclusively, transfer under Section 1404(a) would be permissible in only the most extraordinary situation, and an artful plaintiff would find little trouble in supporting the most arbitrary choice of forum. We submit that Section 1404(a), and the pre-existing doctrine of *forum non conveniens,* were designed to thwart just such opportunities for forum shopping as respondent has opened up by the decision in the instant case.

(d)

A motion to transfer should not be denied on the basis of the plaintiff's alleged change of residence after the commencement of the action and after the making of the motion to transfer.

Although the complaint expressly alleges that the plaintiff is a resident of Florida, petitioner's motion to transfer the action to the Southern District of

Florida was opposed in part on the ground that, during an adjournment obtained by plaintiff's own attorneys, he had taken up "permanent residence" in Queens, in the Eastern District of New York. Plaintiff made no claim, however, that he had contemplated taking up New York residence at the time the action was brought in New York, and indeed his affidavit affirmatively suggests the contrary. While petitioner made an uncontradicted showing that plaintiff continues to own a house and maintain an active bank account in Miami, respondent accepted the statement in plaintiff's affidavit and ruled that "the facts as they now appear indicate that he [the plaintiff] has taken up permanent residence here [i.e., in the Eastern District of New York]."

By accepting the plaintiff's self-serving avowal of local residence at face value, respondent has openly encouraged a change of residence, if only a colorable one, by any plaintiff whose interest in prosecuting a sizable claim in the most favorable forum transcends the temporary inconvenience of acquiring a new "residence" in or near the preferred forum. In the present case plaintiff seeks damages totalling $1,200,000, plus interest and attorneys' fees. It may reasonably be assumed that he selected the Southern District of New York in the belief that it was the forum most favorable to himself. When this choice of forum was challenged by petitioner on the ground that this district had no conceivable relationship to any aspect of the action, plaintiff apparently considered it expedient to come to New York—during an extended adjournment procured by his attorney—to rent an

apartment and to profess the intention of remaining indefinitely. The nature of the move is apparent from the fact that he did not even bother to close his Florida bank account or to put his Miami house on the market. Yet respondent denied petitioner's motion to transfer in part on the basis of this unsupported assertion of a change of residence.

Respondent's decision poses an akward problem. Since the matter of residence is, in the last analysis, a question of subjective intention, it is impossible for a defendant to contradict directly the plaintiff's affidavit of residence, however suspicious the surrounding circumstances may be and however sizable the plaintiff's incentive to falsify his intentions to protect his choice of a favorable, if inconvenient, forum. Thus under the criteria applied by repondent the district courts would be forced to determine—ordinarily from affidavits alone —whether or not the particular plaintiff's statements regarding an alleged change of residence are genuine on the basis of whatever extrinsic circumstances the defendant may be lucky enough to discover. Since direct proof of a plaintiff's fabrication would rarely be available, the Court would ordinarily either have to make an uninformed guess or — as respondent evidently did in the present case—have to accept plaintiff's statement at face value. For these reasons, sound practice requires that, for purposes of deciding whether a transfer under Section 1404(a) should be granted, changes of residence claimed to have been made by the plaintiff after the commencement of the action, and particularly after a motion to transfer has been made, should be completely disregarded. Such a pro-

phylactic rule would go far toward discouraging timely but fraudulent maneuvers to protect a tactical advantage thought to be gained in a pending litigation, and to preserve the beneficial effects sought to be achieved by the enactment of Section 1404(a).

(c)

Practical considerations of convenience, economy and fairness require that this action be tried in Florida.

The decision below failed to come to grips with the practical problems which prompted defendant to make its motion for transfer. The determination below was made on the basis of a meaningless abstraction—"the focus of the action," which respondent deemed not to be "centered exclusively in Southern Florida." Appropriate consideration was not given to all the "practical problems that make trial of a case easy, expeditious and inexpensive." *Gulf Oil Corp.* v. *Gilbert,* 330 U. S. 501, 508 (1947). These practical problems arise directly out of the issues in this case and the sources of available proof relating to these issues. We think it clear at this stage of the proceeding that the principal issues of fact involved in this case are these:

(1) Did petitioner coerce plaintiff, the subdistributors and the independent and chain retail stores in southeastern Florida to maintain prescribed retail prices at each level of distribution and at retail, and did it prohibit the handling of bakery products of other manufacturers?

(2) Did petitioner terminate plaintiff's distributorship because of his refusal to adhere to its alleged unlawful policies, or because he was an unsatisfactory businessman?

(3) Did plaintiff have a "franchise" and, if so, what was its value?

It is evident that the principal proof with respect to these central issues must come from the mouths of Florida witnesses. Who would know better whether or not petitioner enforced unlawful distribution policies through coercion than the alleged victims, the subdistributors and retail store managers in southeastern Florida? Who could better describe the inefficiency and general ineffectiveness of the way in which plaintiff conducted his distributorship than the persons with whom plaintiff did business every day? And on what basis could New York witnesses and a New York jury evaluate a southeastern Florida distributorship, which plaintiff claims is worth $600,000?

To say, as plaintiff in effect has said, that the many independent witnesses whose testimony on these issues is crucial could as readily testify by deposition is to ignore the realities. In many respects such a trial would be a sterile exercise in which a preponderance of the essential evidence would have to be given in the form of depositions read to the jury. If the trial is held in New York, it seems clear that the live testimony will be confined almost entirely to that of the parties themselves: Plaintiff himself on the one hand and petitioner's employees on the other. It seems fair to assume, however, that the parties themselves would be present to testify wherever the trial is held. But the place of trial will, as a practical matter, determine whether all other witnesses will testify in person or whether their testimony must be presented by deposition.

Section 1404(a) was designed to avert just such a situation as this; one of its essential purposes is to prevent a calculating plaintiff, by a shrewd choice of forum, from lessening the impact of witnesses whose testimony he anticipates will be adverse. Thus in the present case, whatever might be the "focus of the action", the important consideration is that only in a Florida court can there be assurance that all of the non-party witnesses will be available to testify in person. Only there can a full and fair trial be assured.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 4, 1965

APPENDIX A

M-503

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

ARTHUR NASH, *Plaintiff,* *against* PEPPERIDGE FARM INCORPORATED, *Defendant.*	63 Civ. 3504

MEMORANDUM

BRYAN, District Judge:

This is an action to recover treble damages for alleged violations of the antitrust laws with a related claim for alleged breach of a franchise agreement for the distribution of defendant's bakery products.

Plaintiff claims that defendant imposed price fixing policies on its distributors and refused to permit them to deal in products other than those manufactured by it unless purchased through it at prices which it fixed, all in violation of §§ 1 and 3 of the Sherman Act, 15 U. S. C. §§ 1 and 14. Plaintiff contends that his franchise was terminated and his business destroyed because of his refusal to conform to such policies.

Defendant denies these allegations and counterclaims for unpaid accounts and goods sold and delivered.

Defendant now moves, pursuant to 28 U. S. C. § 1404(a), for transfer of the action to the Southern District of Florida which was plaintiff's franchise territory.

The issues raised by the pleadings relate, among other things, to the nature of defendant's allegedly wrongful price fixing and other policies, and the manner in which such policies were enforced as against plaintiff. In the light of such issues it cannot be said that the focus of the action has no connection with the general area in the vicinity of this district where defendant has its principal offices, or is centered exclusively in Southern Florida.

While plaintiff was a resident of Florida when the action was commenced, and, indeed, when this motion was made, the facts as they now appear indicate that he has taken up permanent residence here. Considering all the circumstances defendant has not shown that the balance of convenience is so heavily weighted in its favor as to overcome plaintiff's choice of forum and to require transfer to the Southern District of Florida.

The motion for transfer is in all respects denied.

It is so ordered.

FREDERICK v P. BRYAN
U. S. D. J.

Dated: New York, N. Y.
November 24, 1964

APPENDIX B

M-505

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

ARTHUR NASH, *Plaintiff,* *against* PEPPERIDGE FARM INCORPORATED, *Defendant.*	63 Civ. 3504

MEMORANDUM

BRYAN, District Judge:

On motion for reargument of my decision of November 25, 1964, reargument is granted. On reargument I adhere to that decision.

The convenience of witnesses was duly considered on the original motion and as so considered supports the decision made. The underlying question presented for determination is not, as defendant seems to think, whether the district chosen by the plaintiff is the most appropriate forum for the trial of this action but only whether the district that the defendant proposes for transfer is more appropriate. Thus, it is of little if any significance, that a number of prospective witnesses who reside or work in the vicinity of this district do not actually reside or work in the district itself when the transferee district proposed by the defendant is so far removed.

For the same reason, defendant's reliance on the fact that plaintiff's present residence is in the Eastern

rather than the Southern District of New York is misplaced.

I see no grounds here for certification pursuant to 28 U. S. C. § 129(b), and such certification is denied.

It is so ordered.

FREDERICK v P. BRYAN
U. S. D. J.

Dated: New York, N. Y.
December 29, 1964